IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS, of Nashville, Tennessee,
Appellants,

vs.

RAY BLANTON, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. ASHLEY, JR., Attorney General of the State of Tennessee; HARLAN MATHEWS, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; WILLIAM SNODGRASS, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; DR. WAYNE BROWN, Vice-Chairman of the Tennessee Student Assistance Corporation; DR. NYLES C. AYRES, DR. EDWARD BOLING, MR. CLAUDE BOND, MR. FRANK BROGDEN, MR. JOSEPH COPELAND, DR. SAM INGRAM, MR. W. L. JONES, and DR. ROY NIX, Members of the Tennessee Student Assistance Corporation,
Appellees,

and

LORETTA P. BEARD, MARGARET B. BROOKS, GLORIA A. BROWN, BRENDA S. HUMFLEET, ARLILLIAN JONES, COLLEEN KEHLER, LAWRENCE H. NEWBELL, ADDIE MARIE REID, RAYMOND A. SHRIVER and JOHN W. SMYTHIA,
Intervenor-Appellees.

On Appeal from a Three-Judge United States District Court for the Middle District of Tennessee

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees, Ray Blanton, Governor of the State of Tennessee, etc., et al., defendants below, moved to affirm the judgment below on the ground that the District Court did not deviate from but, to

the contrary, faithfully applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues raised by this appeal, thus rendering the questions presented so unsubstantial that further review by this Court is unnecessary.

QUESTION PRESENTED

Whether the Tennessee Student Assistance Program, which provides financial assistance to needy students to attend the college of their choice, regardless of whether it is a public or non-public or sectarian or non-sectarian college, violates the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Challenged Statutes

In 1976, the Tennessee General Assembly enacted Chapter 415 of the Public Acts of 1976, now codified as Tennessee Code Annotated Secs. 49-5013—49-5021, with the express legislative purpose of:

> ". . . providing needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee. . . ."[1]

This legislation enacting the Student Assistance Program also expressly repealed an earlier Tuition Grant Program that

[1] The state statutes embodying the Tennessee Student Assistance Program may be found at pages A-1—A-6 of the appendix to the Jurisdictional Statement (hereinafter cited as J.S. App.).

had been the object of previous litigation in the case of *Americans United v. Dunn*, 384 F.Supp. 714 (1974).

Monetary awards under the Program are based solely on a financial need of the student, and are granted to residents of Tennessee ". . . without regard to county or other area of residence, race, color, creed, sex, or national origin or ancestry." J.S. App. p. A-4, and payment of awards are made directly to the students. J.S. App., p. A-4. The awards are available to students at public colleges and universities, public vocational or technical institutes, and non-public colleges or universities which are accredited by the Southern Association of Colleges and Schools. J.S. App., p. A-3 to A-4. An award recipient may transfer from one institution to another upon notification to the Tennessee Student Assistance Corporation and authorization to transfer from said Corporation. J.S. App., p. A-5.

The statutes provide specifically that no effort is to be made by state officials or by the administering organization, the Tenneseee Student Assistance Corporation, to influence a student's selection of institutions. J.S. App., p. A-5.

The maximum award available to a student under the Program is $1200, or the total amount of tuition and mandatory fees, whichever is the lesser amount. J.S. App. p. A-4. For the 1976-1977 academic year, the Program was funded with $1.5 million, one-half of which was appropriated by the Tennessee General Assembly, and the other half was provided by federal matching funds. J.S. App., p. A-21. The statutes expressly prohibit any official connected with the administration of the Program from influencing selection by an applicant of the institution which he might attend. J.S. App., p. A-5. During the 1976-1977 academic year, more than 2,000 students attending 35 private colleges and 21 public institutions received benefits under the Program, and, because of the limited level

of funding, less than one-fourth of all students who applied for assistance received awards.[2]

The opinion of the District Court accurately summarizes the actual operation of the Program during the 1976-1977 academic year. J.S. App., p. A-20 to A-21.

B. The Proceedings Below

The Appellants, who are one national organization with a chapter in Nashville, Tennessee, and four citizens and taxpayers of the State, filed their complaint herein for declaratory and injunctive relief challenging the constitutionality of the Tennessee Student Assistance Program, a statute of state-wide application, on June 23, 1976, pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202. Since the action was filed prior to the repeal of 28 U.S.C. §§ 2221 and 2222 and the amendment of § 2284, the case was properly heard pursuant to §§ 2281 and 2284 by a three-judge District Court.[3]

The complaint named as defendants several state officials charged with the responsibility for administering the program. Subsequently, ten students attending both public and private colleges who had qualified for awards under the Program, were permitted to intervene as defendants.

By agreement of the parties and with leave of the Court, a single District Judge was designated to conduct the evidentiary portion of this case, with the evidentiary hearing beginning on February 28, 1977, and lasting three days. The plaintiffs' case consisted of evidence about three (3) of the thirty-nine (39) private colleges and universities in Tennessee and about

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[2] Plaintiffs' exhibit No. 23.

[3] This action was commenced prior to the effective date of Pub. L. 94-381 amending 28 U.S.C. § 2284 and repealing 28 U.S.C. §§ 2281 and 2282.

the lobbying activities of the Tennessee Council of Private Colleges while the program was being considered by the Tennessee General Assembly. The state defendants placed in evidence the various documents used in administering the Program together with the testimony of the two public officials primarily responsible for administering the Program. The ten student intervenors presented testimony about the importance of the Program in financing their college educations, and their use of the monies awarded to them.

Immediately following the evidentiary hearing, the impaneled three-judge District Court was convened and heard argument by the parties and directed that post-hearing briefs be submitted. On May 19, 1977, the District Court issued its opinion ruling unanimously that the Student Assistance Program did not violate the Establishment Clause. On the same day, the Court entered its Judgment dismissing the complaint herein.

C. The Decision Below

The District Court found no merit in the Appellants' constitutional claim by applying the three-part Establishment Clause test of purpose, primary effect, and excessive entanglement that this Court's decisions have evolved over the past several years. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Meek v. Pittenger*, 421 U.S. 349 (1975). Since there was no serious dispute that the challenged statutes had the requisite secular purpose and had not generated excessive government entanglement with religion or religious institutions, the Court below focused on the primary effect branch of the controlling Establishment Clause test. J.S. App., pp. A-23 to A-24.

After distinguishing the analysis employed by this Court's Establishment Clause decisions in cases involving aid directly to church-related schools from those in which aid was pro-

vided directly to students attending such schools, the District Court initially addressed the Appellants' contention that the Student Assistance Program provided direct institutional aid and rejected that contention. J.S. App., pp. A-24 to A-27. The District Court then turned to the issue of whether the primary effect of the challenged aid program breached the constitutional command of government neutrality by examining the decisions of this Court which have applied the so-called "child benefit" theory. The District Court noted that, with one exception which it found not controlling, this Court has sustained the constitutionality of aid programs in situations wherein the aid has been provided to students, or their parents, and such aid is made available regardless of whether a student attends a public or non-public school.[4]

The exception, which was heavily relied upon by the Appellants, is, of course, the case of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), wherein this Court invalidated a New York program of tuition grants and tax credits to students attending parochial secondary and elementary schools.[5] The District Court held the *Nyquist* case not controlling by pointing out that in this case, in contrast to the *Nyquist* case, state funds are provided to students regardless of whether they attend a private or a public school and there is no proof in this record showing a predominance of benefits or any special benefit to any religious group.

The District Court also relied in part on a footnote in the *Nyquist* case which, the Appellees submit, clearly indicated that

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[4] *See, Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975).

[5] The Court also held unconstitutional a Pennsylvania program of tuition reimbursement for parents of students attending parochial elementary and secondary schools in the case of *Sloan v. Lemon*, 413 U.S. 825 (1973), on the same day it announced its decision in the *Nyquist* case.

this Court would have reached a contrary conclusion in the *Nyquist* case had it been reviewing a program such as the one herein involved. 413 U.S. at 782, n. 38. After analyzing the cases set forth in said footnote, the District Court concluded that the program herein involved had a primary effect which neither advanced nor prohibited religion.

In addition to the aforesaid footnote and an analysis of the authorities cited therein, the District Court also relied upon this Court's disposition of the case of *Durham v. McLeod*, 193 S.E. 2d 202 (1972), appeal dismissed, 413 U.S. 902 (1973), the same day that the *Nyquist* decision was rendered. In the *Durham* case the South Carolina Supreme Court held that a state statute authorizing a state agency to make, insure, or guarantee loans to students regardless of the institution of higher education which they attended did not violate either the Constitution of the United States or the Constitution of the State of South Carolina. That statute placed no restrictions on the course of study undertaken by the borrower. The Supreme Court of South Carolina concluded that the emphasis of the program was on the student, that all eligible institutions were free to compete for the students, and that the aid involved was to higher education and not to any institution or group of institutions. Therefore, that court concluded that the act or program was ". . . scrupulously neutral as between religion and irreligion and as between various religions." 193 S.E.2d at 204. Recognizing the precedential value of the dismissal of the *Durham* appeal the same day that the *Nyquist* case was decided, the District Court concluded that the Tennessee Student Assistance Program was constitutional on its face and as applied, stating:

> "In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is

favored by the program, nor are private or religious institutions favored over public institutions."

J.S. App., p. A-31.

In rejecting the Appellants' contention that the program involved provides an incentive to attend a private college rather than a public college, the District Court pointed out that statistical evidence introduced at the hearing showed that as of February 3, 1977, some fifty-nine percent (59%) of the students receiving aid attended public institutions, and that testimony at the hearing established that private college tuition averages in excess of the maximum student grant under the program, or $1,200. Therefore, the District Court concluded that if the program does provide any incentive to select one college over another, the incentive did not appear to be in favor of the private institutions.

Being convinced that the Tennessee Student Assistance Program was, as stated in the Act, a program to provide needy students with the opportunity to attend the higher education institution of their choice, regardless of whether it be public, private, sectarian or non-sectarian, and that the said program had a totally neutral purpose, the District Court concluded that the program herein involved was a student aid program rather than an institutional aid program and was valid on its face and as applied.

ARGUMENT

A. Further Review Not Warranted.

Commencing in 1971, this Court has issued several major opinions defining in various factual contexts the limitations the Establishment Clause imposes on government's power to provide public funds which benefit education in church-related schools. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), and *Wolman v. Walter*, 45 U.S.L.W. 4861 (U.S., June 21, 1977). Additionally, the Court has summarily affirmed[6] or refused to hear numerous other cases raising the same issue and two of these presented the exact issue posed by this appeal. *Americans United v. Rogers*, 528 S.W.2d 711, cert. denied 429 U.S. 1029 (1976), and *Durham v. McLeod, supra*.

The three-pronged test of purpose, primary effect and excessive entanglement is now firmly established as the legal basis for ascertaining the constitutionality of institutional aid programs, and the "child benefit" analysis is firmly established as the test of the validity of student aid programs. These decisions further establish that a clear constitutional line is to be drawn between aid to the elementary and secondary schools which are

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[6] *E.g., Wolman v. Essex*, 421 U.S. 982 (1975); *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974); *Luetkemeyer v. Kaufman*, 419 U.S. 888 (1974); *Marburger v. Public Funds for Public Schools*, 417 U.S. 961 (1974); *Grit v. Wolman*, 413 U.S. 901 (1973); *Essex v. Wolman*, 409 U.S. 808 (1973); *Brusea v. State Board of Education*, 405 U.S. 1050 (1972); *Sanders v. Johnson*, 403 U.S. 955 (1971).

church related and church-related colleges and universities. *E.g.*, *Committee for Public Education v. Nyquist, supra,* 413 U.S. at 777, n. 32, and *Tilton v. Richardson, supra,* 403 U.S. at 685. While the Court has upheld the programs of aid to the church-related colleges it has reviewed, it has struck down public aid to parochial elementary and secondary schools. *Roemer v. Board of Public Works, supra; Tilton v. Richardson, supra,* and *Hunt v. McNair, supra.*

These Appellees submit that since this Court has heretofore on several occasions defined the constitutional issues to be decided in this type of case, and the Appellants have failed to demonstrate convincingly that the District Court herein disregarded the controlling constitutional criteria established by the Court, their appeal herein should fail. A reading of the District Court's opinion herein reflects no deviation from this Court's recent decisions and the governing constitutional criteria established therein. Thus, the decision below should be summarily affirmed by this Court.

B. Proper Student Aid Analysis.

As aforesaid, this Court has given separate and distinct considerations to cases involving direct aid to church-related schools and aid to students who may attend such schools.[7] The District Court herein appropriately concluded that the program herein involved was one of student aid, not institutional aid. These Appellees submit that the proper analysis for student aid programs is more limited than the test to be applied to student aid programs under relevant decisions of this Court. As this Court has previously stated, the "test" utilized in prior Establishment

[7] *See, e.g., Roemer v. Board of Public Works, supra; Tilton v. Richardson, supra; Lemon v. Kurtzman, supra; Allen v. Board of Education, supra; Everson v. Board of Education, supra.*

Clause cases ". . . serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger, supra,* 421 U.S. at 359; *Tilton v. Richardson, supra,* 403 U.S. at 677-78. In the recent case of *Roemer v. Board of Public Works,* Mr. Justice Blackmum announced the judgment of the Court in its plurality opinion and stated that the applicable constitutional standard is:

> "Neutrality is what is required. The state must confine itself to secular objectives and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied."
>
> (93 S.Ct. at 2345)

The District Court in its opinion herein strove assiduously to determine that the program involved was one of neutrality and found that it was.

As to programs providing public aid directly to church-related schools, these Appellees submit that this Court's decisions indicate that the central inquiry is whether the institutions involved are eligible for the aid or are of such character that to aid them will aid or advance religion. The test in such cases is whether the educational programs at eligible church-related institutions are permeated with religion, or, as stated in *Hunt v. McNair, supra,* whether the public funds flow:

> "To an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."
>
> (413 U.S. at 743)

Likewise, in the recent case of *Roemer v. Board of Public Works, supra,* the Court affirmed this approach stating that in such cases:

"Our holdings are better reconciled in terms of the character of the aided institution when institutional aid programs are challenged."

(49 L.Ed.2d at 199)

These Appellees submitted, however, that when examining a program such as the Tennessee Student Assistance Program herein involved, the Court's relevant decisions make clear that no such institutional eligibility analysis is constitutionally mandated or required. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), and the textbook loan portions of *Meek v. Pittenger, supra*, and *Wolman v. Walter, supra*. In student aid programs the religious character of the schools involved have not been a predominant consideration, and the entanglement branch of the three-part test applied to institutional aid programs does not appear to have been of importance. These Appellees recognize that merely because aid is channeled to students or their parents rather than directly to church-related schools, a program's constitutional validity is not completely established. Rather, this is "one among many factors" to be considered. *Committee for Public Education v. Nyquist, supra*, 413 U.S. at 781. In the *Nyquist* case, *supra*, the Court noted that the benefits of the programs challenged in the *Everson* and *Allen* cases, *supra*, were available to children at both public and private schools. 413 U.S. at 782, n. 38. Additionally, in the *Nyquist* decision the Court cited, with approval, its summary affirmance [409 U.S. 808 (1972)] of the decision in *Wolman v. Essex*, 342 F.Supp. 399 (S.D. Ohio). In the *Essex* case the program's benefits were available only to private school students and those students predominantly attended Roman Catholic schools.

On the same day the Court decided the *Nyquist* case, *supra*, it summarily dismissed, for want of a substantial federal question, the appeal of a case challenging on constitutional grounds a South Carolina student aid program that had those precise

characteristics. *Durham v. McLeod, supra*. As aforesaid, the South Carolina Supreme Court in the *Durham* case observed that under that program all public and non-public college students were eligible to borrow funds, and the aid was to the students and not to the institutions.

As aforesaid, the District Court herein found that there was no dispute that the program had secular objectives and also found that the effect of the program was scrupulously neutral in terms of neither advancing or impeding religion. J.S. App., p. A-31. In so concluding, these Appellees submit that the District Court correctly applied the controlling decisions of this Court on the issues involved, and further review by this Court is not warranted.

C. Requirement of Secular Use Restriction

The Appellants contend that to pass constitutional muster a student aid program must

"1) be made available to both public and private students alike so that no one religious group receives a special benefit, and 2) be restricted in such fashion to guarantee that the State is supporting only the secular portion of the students' education."

J.S., pp. 8-13.

While this Court has ruled that secular restrictions of the type described by the Appellants are a necessary element of institutional aid programs, *Tilton v. Richardson, supra*, and *Hunt v. McNair, supra*, this Court on no occasion has ruled that such restrictions must constitutionally be contained in the student aid program.

The Appellants, in support of this contention, rely on the *Nyquist* decision but these Appellees submit that that decision affords no support to this contention. The Court perceived the

New York tuition grant program involved in the *Nyquist* case as an institutional aid program. 413 U.S. at 783, and the absence of a secular use restriction to confine the aid to the secular aspects of the sectarian elementary and secondary schools involved was fatal to the program.

Likewise, the Court's decisions in *Wolman v. Walter, supra; Meek v. Pittenger, supra; Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,* furnish no support for this contention by the Appellants. In this regard, these decisions furnish support only for the contention that the Establishment Clause imposes a bar to the state's providing religious texts to assist the educational process whether it be in private or public schools. In the *Meek* and *Wolman* decisions, *supra,* the secular textbook loan programs were upheld despite the fact that students in sectarian schools were to utilize the textbooks.

The requirement that the aid provided must be neutral was satisfied in the *Wolman, Meek* and *Allen* cases since the state provided textbooks which were secular in content. In the instant case, the state is providing money for the students to use for educationally related expenses, and there can be no argument that money itself is either religious or sectarian in nature. Indeed, this aid is generally available to needy students regardless of the nature of the institution of higher education which they choose to attend.

Therefore, these Appellees submit that the program herein involved meets the requirement that the aid provided in student aid programs be secular in nature, and that an absence of secular use restrictions in this program is not constitutionally fatal.

D. Financial Support of Religious Education

Appellants also argue that this Program is unconstitutional because it assists students in obtaining a religious education, J.S., pp. 11-22, or in the alternative, it provides direct support to sectarian colleges, J.S., pp. 22-26.

The Appellants present evidence regarding only three of the twenty-six private colleges in Tennessee whose students receive awards of money from the aid program involved, and there is no evidence of any religious affiliation of the other twenty-three such private colleges. Six of the ten intervenors whose testimony was presented attended colleges with varying degrees of religious orientations. Their testimony established that their schools were of a nature closely resembling those found eligible for direct institutional aid in the cases of *Roemer v. Board of Public Works, supra,* and *Tilton v. Richardson, supra.* While it is true that the District Court observed that "some but not all of the private schools whose students benefited from this program were operated for religious purposes, with religious requirements for students and faculty, and were admittedly permeated with the dogma of the sponsoring religious organization," (J.S. App., p. A-22) the record does not reveal the names of the institutions in the mind of the Court. These Appellees submit that this finding does not establish that even those institutions provide an education religious in nature. Again, institutions with religious characteristics were found not ineligible for direct aid in the *Roemer* and *Tilton* decisions, *supra.*

The Appellants contend that they presented evidence of three colleges with overwhelming sectarianism but support this contention with selected pieces of evidence about only one of those three colleges. J.S., pp. 13-16. These Appellees submit that a review of all the evidence presented concerning that one college would refute that contention. Notwithstanding the fact that some of the students who benefit from this program may attend colleges which are substantially religious in nature, such fact does not render this program, which is a student aid program, unconstitutional. In the *Wolman* and *Meek* cases, *supra,* the students receiving textbook loans were enrolled in pervasively sectarian parochial schools, but this Court nevertheless upheld

those programs. Thus, these Appellees submit that the aid herein involved being neutral in nature, the District Court correctly sustained the constitutionality of the program.

As aforesaid, the Appellants apparently alternatively contend that the program involved impermissibly provided indirect support to sectarian colleges, and base that contention upon the fact that some students who attend church-related colleges may choose to pay tuition bills with their awards, and therefore, state funds would be channeled into the coffers of ineligible institutions.

As recognized by the District Court, the program herein involved is one of student aid, not institutional aid. The evidence established that the students were paid the awards in their own names and that students, not colleges, must establish their eligibility for the awards. Likewise, the testimony revealed that the student who receives an award under this program may use the funds for many personal needs. Even though a student may have an unliquidated debt at the institution, he or she may receive their award, in accordance with the regulations of the program, by providing evidence to the Corporation that he or she will use the funds for educationally related expenses. As pointed out by the District Court, one salient fact establishes that this program is one of student aid:

> "The fact that the aid herein is not direct institutional aid as in the above cases may be shown by a hypothetical situation: If the plaintiffs sought the return to the state of monies distributed under the program as in *Roemer v. Board of Public Works, supra,* the court could not require the institutions to return the funds because the money is the student's and he may use it outside the institution."
>
> J.S. App., p. A-25.

As further found by the District Court, the testimony at the hearing showed that:

> ". . . while tuition is often paid by the award, other educationally related expenses such as room rent, bus fare, clothing and health care expenses, can be and have been paid with Program funds, and that the formula adopted for determining the actual amount of a student's need takes into account such personal expenses. If the student should decide to transfer from one institution to another, he may do so and keep his assistance, provided he notifies the Corporation and approval is given."
>
> J.S. App., p. A-21.

Thus, the evidence establishes that any benefit a college might receive under this Program is incidental and indirect. The Appellants' contention that to the extent the Program permits a student to attend a private college which he might not otherwise be able to attend, it is unconstitutional, has been previously conclusively disposed of by this Court in the *Board of Education v. Allen* decision, *supra,* 392 U.S. at 244, adverse to the Appellants.

Therefore, these Appellees submit that this Program meets all the constitutional requirements set forth in this Court's decisions and that the District Court's decision herein is constitutionally sound.

CONCLUSION

The judgment below should be affirmed summarily because no substantial question remains justifying plenary review by this Court.

Respectfully submitted,

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Chief Deputy Attorney General
State of Tennessee